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IN THE  
**SUPREME COURT OF THE UNITED STATES**

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OCTOBER TERM, 1977

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No. **77-571**

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SHEARN MOODY, JR.,  
Petitioner,

vs.

THE STATE OF TEXAS,  
Respondent.

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**BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO  
THE COURT OF CIVIL APPEALS FOR THE NINTH SUPREME  
JUDICIAL DISTRICT OF TEXAS**

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**STATEMENT OF THE CASE**

A brief review of the facts, most of which are candidly recited in the Petition at pp. 5-6. will show that the judgment entered by the trial court is completely unassailable.

This action was commenced by the Moody National Bank of Galveston, Texas, by filing a bill in interpleader in the 53rd Judicial District Court of Travis County, Texas. The interpleader action was filed after Shearn Moody, Jr. demanded that the bank not pay a semi-annual income dividend from  $\frac{3}{8}$ ths of a  $\frac{1}{8}$ th interest in the Libbie Shearn Moody Trust. The interest in the foregoing trust had been assigned by Moody to the

Empire Life Insurance Company of America ("Empire"), and had subsequently been assigned by the Receiver of Empire, pursuant to the terms of a reinsurance treaty, to Protective Life Insurance Company of Birmingham, Alabama ("Protective").\* As Empire was an Alabama corporation, the domiciliary receiver for Empire was appointed in Alabama. The trial court below had appointed respondent Herbert Crook as ancillary receiver for Empire in Texas. Protective intervened. Moody claimed in the interpleader action below that when he assigned the trust interest to Empire, he had done so in such a manner as to prevent Empire from further transferring the interest to any other party, such as Protective. The sole issue presented in the interpleader action, therefore, was whether the Empire Receiver had authority to transfer the trust interest to Protective.

That precise issue had already been litigated by the Empire Receiver and Moody in a declaratory judgment action filed by Moody in the 122nd Judicial District Court of Galveston County, Texas, in which Moody sought a declaration that the Empire Receiver did not have the right or power to assign the trust to any third party. The trial court granted summary judgment for the Empire Receiver, holding that the Empire Receiver had an unfettered right to transfer the trust interest to any third party. Moody appealed that judgment, and it was during the pendency of that appeal that Moody made demand on the Moody National Bank that it not pay the trust income to Protective, and the bank interpleaded the trust income in the action below. In the "Response of Shearn Moody, Jr. to Motion for Summary Judgment," below, Moody admitted that the issue in the Galveston case and this one were identical, and conceded that a final judgment in the Galveston case would be *res judicata* in this one (Appendix A attached hereto).

\* For a development of the facts relating to the Empire receivership and the reinsurance treaty, see pp. 3-12 of Brief in Opposition to Petition for Writ of Certiorari filed contemporaneously with this brief in Case No. 77-428.

Subsequently, the Texas Court of Civil Appeals affirmed the summary judgment granted by the Galveston trial court, and the judgment became final when the Texas Supreme Court denied review of the decision of the Court of Civil Appeals. *Moody v. Moody National Bank of Galveston, et al.*, 522 S.W. 2d 710 (1975, writ ref'd n.r.e.). Specifically, the Court of Appeals held:

The trial judge correctly held that as a matter of law, the plaintiff assigned and transferred to Empire full and complete title and interest to two-fifths of [Moody's] right to receive during his lifetime an undivided one-eighth of the income from the Libbie Shearn Moody Trust and that Empire acquired the absolute and unconditional power to transfer, assign and convey all or any part thereof without the permission of the plaintiff or the trustee.

522 S.W.2d at 710.

On the basis of the judgment in the Galveston case, as affirmed by the Texas Court of Civil Appeals, the Travis County court, the trial court below, ordered that the trust income interpleaded be paid to the Texas Receiver for transmission to Protective under the terms of the reinsurance treaty.

Faced with the conclusive adjudication against him in the Galveston case, Moody sought to create a phantom issue in the interpleader action then pending in the trial court below. This phantom issue was whether the Texas ancillary receivership court had properly approved an amendment to the reinsurance agreement between Protective and the Empire Receiver without a plenary hearing. This amendment ("Agreement to Effectuate Treaty of Assumption and Bulk Reinsurance" set forth at Petr's App. A-23-32) had nothing to do with anyone's entitlement to the interpleaded funds. It had nothing to do with the assignment of the trust interest to Protective. It concerned solely the rights of Empire policyholders under the reinsurance agreement with Protective.

## ARGUMENT

### I. The Decision Below Was Clearly Correct, and the Petition Should Be Dismissed.

Moody was never an Empire policyholder. The Agreement to Effectuate did not affect his rights and interests in any way. Thus, the appellate court below quite correctly held that Moody did not have standing to complain of the Agreement to Effectuate. In making this ruling, the Court of Appeals stated in *dictum* that the record did not disclose that Moody was a stockholder of Empire. Whether this observation of the Court of Appeals was accurate as a matter of fact is wholly immaterial to the correctness of the judgment of the trial court or its affirmance by the Court of Appeals. The Agreement to Effectuate did not affect the rights of Empire stockholders in any way. The sole issue presented by the bill in interpleader below was whether the Receiver had the right to assign the trust interest to Protective, and this issue had been conclusively decided against Moody in the Galveston case. Under the doctrine of *res judicata*, which Moody conceded was applicable in this case, the trial court properly granted summary judgment for the Receiver and Protective.

Accordingly, the sole reason asserted by Petitioner for granting the writ requested is of no significance at all. It does not help Petitioner to claim that he is an Empire stockholder and his status as such was ignored by the Texas trial court, the Court of Civil Appeals, and the Texas Supreme Court. There is no reason why Moody's claimed status as a stockholder should not have been ignored by the courts of Texas, as it was totally immaterial to the case presented to those courts.

The additional review that Moody seeks in this Court of this irrelevant, sham issue which is unlikely to recur and is of no interest to anyone other than the parties before this Court should be denied.

## CONCLUSION

For the foregoing reasons, the petition is due to be denied.

Respectfully submitted,

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### Proof of Service

Proof of service of three copies of Respondent's Brief in Opposition to Petition for Writ of Certiorari upon all parties separately represented by counsel was filed by Drayton Nabers, Jr., a member of the Bar of the United States Supreme Court, with the Clerk of the United States Supreme Court on the same date the brief in opposition was filed.

# APPENDIX

— A-1 —

No. 198,374

The State of Texas

vs.

Empire Life Insurance Company  
of America, et al.

In the District Court  
of Travis County, Texas  
53rd District

## RESPONSE OF SHEARN MOODY, JR. TO MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

Comes Now Defendant, Shearn Moody, Jr., and files this his Response to Motion for Summary Judgment of the Ancillary Receiver of Empire Life Insurance Company of America, and Protective Life Insurance Company, Intervenor, and as grounds therefor, would respectfully show the Court as follows:

I

### Prior Suit Is on Appeal and Is Not Res Judicata

The Ancillary Receiver and Protective assert that the judgment in the case, Shearn Moody, Jr. v. Moody National Bank of Galveston, et al., No. 112,034 in the 122nd District Court of Galveston County, Texas rendered on November 27, 1974, affirmed by the 14th Civil Court of Appeals in Houston on April 23, 1975, is res judicata as to the question raised by the Moody National Bank of Galveston's interpleader of funds received by it under the Libbie Shearn Moody Trust, and as to the right of Empire to transfer and assign the Libbie Shearn Moody Trust interest in the hands of Empire to Protective Life Insurance Company. The issues in that action are identical to the issues involved here. The question there, as here, is whether

Empire has an unfettered right to reassign the Trust interest and the income therefrom. Moody asserted two claims: (1) claim for a declaratory judgment, declaring that Moody's assignment of  $\frac{2}{3}$  of  $\frac{1}{8}$  life estate interest in the Libbie Shearn Moody Trust to Empire Life Insurance Company of America was to Empire alone and not to its successors or assigns, and that the interest could be assigned under the terms of the modified spendthrift trust and the assignment only with the consent of Moody and the Trustee, Moody National Bank of Galveston, and (2) an action for reformation, that if the assignment conveyed such an unfettered right to reassign then it was based on mutual mistake. A copy of Plaintiff's Amended Petition in that case is attached as Exhibit "A" to Moody's Plea in Abatement and incorporated by reference herein.

Indeed, not only are the issues in the two cases the same, and except for Protective, the parties are the same, Empire has moved for a summary judgment in this action on the identical grounds that Empire moved for a summary judgment in the other case. As there, Empire asserts that a judgment of September 20, 1959 by the 56th Judicial District Court of Galveston, Texas in Cause No. 87,263 styled "Moody National Bank of Galveston v. W. L. Moody, III et al." is res judicata as to the ability of Empire to reassign its interest assigned to it in 1963. (Apparently this position was rejected by the Galveston District Court and the 14th Civil Court of Appeals since neither the judgment or opinion makes mention of this issue.) As there, Empire asserts that Moody is estopped by certain alleged declarations from claiming that the interest assigned to Empire was not freely transferable. (In this regard it is interesting to note that the 14th Civil Court of Appeals stated at page 5 of its opinion, "At no time was the Trust interest which had been conveyed to him ever assigned by Empire to any other party".) In that case as here, Empire asserts that the 1963 assignment was unambiguous on its face and as a matter of law gave Empire the unfettered right to

reassign that interest. (The 14th Civil Court of Appeals upheld this position, even though certain ambiguities existed on the face of the documents and even though Moody's First Amended Petition contained a claim for reformation based on mutual mistake if the documents were deemed to be unambiguous.)

However, the Ancillary Receiver and Protective have neglected to point out that an Application for Writ of Error to the Supreme Court of Texas has been timely filed by Moody in the above mentioned case. A certified copy of that Application for Writ of Error is attached as Exhibit "C" to Moody's Plea in Abatement and incorporated by reference herein. A certificate of Garson R. Jackson, Clerk of the Texas Supreme Court, certifying that the Application for Writ of Error was filed in the Texas Supreme Court on June 17, 1975 and is still pending, as of July 14, 1975, before the Texas Supreme Court is attached hereto as Exhibit "C" incorporated by reference herein. Additionally, the certified copy of the judgment of the 14th Court of Civil Appeals in Houston is attached hereto along with the certificate of the Clerk in the 14th Court of Civil Appeals in Houston, certifying that Moody's Application for Writ of Error was timely filed with that Court on June 13, 1975, that the entire record of the cause was sent to the Clerk of the Supreme Court, that the Clerk of the Supreme Court has mailed a receipt to the Court of Appeals Clerk reflecting that the Application for Writ of Error was filed in the Texas Supreme Court on June 17, 1975, and that the case has not been returned to the 14th Court of Appeals as of July 16, 1975.

Accordingly, it is abundantly clear that proceedings are still pending in the case which the Ancillary Receiver and Protective ask to be given res judicata effect in this matter. Moody's Application for Writ of Error is still pending before the Texas Supreme Court. Consequently, Moody would show that as a

matter of Texas law, the aforementioned action is not, and cannot be res judicata of the identical issues involved in Empire's Motion for Summary Judgment until the judgment in the other case is final and all appeals have been exhausted. Under Texas law, this is not, and cannot be the case until Moody's Application for Writ of Error, now pending in the Supreme Court of Texas, is acted upon one way or the other by that Court.

[Subsequent parts of Response omitted]